TURNER BROTHERS INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-378 Decided April 20, 1988

Appeal from a decision of Administrative Law Judge Frederick A. Miller upholding jurisdiction of OSMRE to issue Cessation Order No. 84-3-259-l3 and finding the order to have been validly issued based on the facts presented at the hearing. TU 5-3l-R.

Affirmed.

l. Regulations: Validity--Surface Mining Control and Reclamation Act of l977: Appeals: Generally--Surface Mining Control and Reclamation Act of l977: Federal Program: Generally

Under 43 U.S.C. | l276(a)(l) (l982), judicial review of the validity of regulations promulgated under the Surface Mining Control and Reclamation Act of l977 is available only in the United States District Court for the District of Columbia, and the Interior Board of Land Appeals will not entertain arguments based on claims as to the invalidity of regulations promulgated under that Act.

2. Surface Mining Control and Reclamation Act of l977: State Program: Generally

The administrative procedures established by 30 U.S.C. | 1271(b) (l982) of the Surface Mining Control and Reclamation Act of l977 override those established by the Administrative Procedure Act, and, therefore, no violation of 5 U.S.C. | 553(d) (l982) occurred when the Office of Surface Mining Reclamation and Enforcement did not provide notice 30 days prior to taking over the Oklahoma enforcement program.

3. Administrative Procedure: Adjudication--Solicitor, Department of the Interior--Surface Mining Control and Reclamation Act of l977: Enforcement Procedures: Generally

When a party to an adversary proceeding within the Department and a Departmental agency acting through

its attorneys in the Office of the Solicitor reach and sign a compromise agreement concerning that proceeding and an Administrative Law Judge issues a consent deci- sion approving that agreement, the parties are bound to the terms of the agreement as a matter of contract.

4. Estoppel--Res Judicata

The Department has long recognized the need to apply the administrative counterpart of the principle of res judicata--the doctrine of administrative finality--to preclude reconsideration of a decision of an agency official when a party, or his predecessor in interest, had an opportunity to obtain review within the Depart- ment and no appeal was taken, or an appeal was taken and the decision was affirmed. The rule is subject to the exception that review is available to correct or reverse an erroneous decision upon a showing of compel- ling legal or equitable reasons such as violations of basic rights or the need to prevent an injustice.

5. Administrative Procedure: Adjudication--Res Judicata-- Surface Mining Control and Reclamation Act of l977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of l977: Hearings: Generally

When a party reaches an agreement with the Office of Surface Mining Reclamation and Enforcement and withdraws its application for review of a notice of violation, the decision of an Administrative Law Judge dismissing the application is final unless appealed. As a consequence of the dismissal, there is no longer an application for review pending in the Office of Hearings and Appeals, and issues as to the contents of the NOV may no longer be raised, absent a showing of compelling equitable or legal reasons why the dismissal should be set aside.

6. Surface Mining Control and Reclamation Act of l977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of l977: Notices of Violation: Generally

A notice of violation must inform a party of the spe- cific nature of the legal standard for which he is being cited, the specific condition at the minesite which has been found to constitute a violation, and the specific manner by which the condition may be abated. Similarly, a cessation order must inform a party of the particular legal standard at issue and the condition at the minesite which violates the standard.

Arguable ambiguities in the contents of an otherwise proper NOV do not invalidate an enforcement action in the absence of a showing of actual prejudice to the recipient.

7. Administrative Authority: Generally--Surface Mining Control and Reclamation Act of l977: Applicability: Generally--Surface Mining Control and Reclamation Act
of l977: Federal Program: Existence of Mining Opera- tions--Surface Mining Control and Reclamation Act of l977: Hearings: Generally

The Office of Surface Mining Reclamation and Enforce-
ment has "jurisdiction" over all surface coal mining and reclamation operations when inspecting for the purposes stated in 30 U.S.C. | 1267(a) (l982). In regard to inspections, the only issue as to "subject matter jurisdiction" would be a claim that the site inspected is outside the scope of the Surface Mining Control and Reclamation Act of l977 because it is not a surface coal mining or reclamation operation, is not engaged in any activity connected with a surface coal mine, or does not otherwise come under the provisions of the Surface Min- ing Control and Reclamation Act of l977.

APPEARANCES: Robert J. Petrick, Esq., General Counsel, and Mark Secrest, Esq., Assistant General Counsel, Muskogee, Oklahoma, for appellant Turner Brothers, Inc.; Angela O'Connell, Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Turner Brothers Incorporated (TBI) has appealed a decision of Admin- istrative Law Judge Frederick A. Miller dated January 3l, l986, upholding jurisdiction of the Office of Surface Mining Reclamation and Enforcement (OSMRE) to issue Cessation Order (CO) No. 84-3-259-l3 and finding the order to have been validly issued based on facts presented at a hearing held in Tulsa, Oklahoma, September l9 and 20, l986 (TU 5-3l-R).

The history of this case began on January 6, l984, when OSMRE Inspector Samuel M. Petitto, Jr., visited TBI's Heavener Mine No. 3l0l and subsequently issued a 10 day notice to the Oklahoma Department of Mines (ODOM) concerning, inter alia, a finding of loss of topsoil by spoiling topsoil in the pit at the minesite (Tr. l5-l6). See 30 U.S.C. | l27l(a) (l982). ODOM inspected the minesite and reported to OSMRE that it failed to find a violation (Tr. l6). Inspector Petitto reinspected the site on February l, l984, and issued TBI Notice of Violation (NOV) No. 84-3-38-3 the next day (Tr. l7, Exh. R-l). The NOV included two violations. The first cited TBI for "[f]ailure to remove and salvage all topsoil in a separate layer from areas to be disturbed by mining operations," citing 30 CFR 8l6.2l, 8l6.22(a)-(c), 936, and Oklahoma Permanent Regulatory Pro- gram Regulations (OPRPR) 8l6.2l and 8l6.22(a)-(c). The second cited TBI

for "[f]ailure to construct [a] sedimentation pond in accordance with Section 8l6.46 before conducting any surface mining activities in the drainage area to be affected." The two violations cited in the NOV were subsequently treated as separate matters, and the present appeal concerns only the first. 1/

On March 29, l984, OSMRE again inspected the Heavener Mine and issued CO No. 84-3-ll-6 for TBI's failure to abate violation No. l of NOV No. 84-3-38-3 (Exh. R-2). Due to modification of the NOV to permit TBI additional time to comply with abatement requirements (Exh. R-3), the CO was terminated (Exh. R-4). Following additional modifications to the NOV and a further extension of time (Exhs. R-5, R-6), on May 24, l984, OSMRE issued CO No. 84-3-257-l, again citing TBI for failure to abate violation No. l of NOV No. 84-3-38-3 (Exh. R-7).

TBI filed challenges to both the NOV and the CO with the Office of Hearings and Appeals. Prior to a hearing, OSMRE and TBI signed a "consent decree," and on July 24, l984, Judge Miller issued a consent decision approving the terms of the consent decree and dismissing the applications for review of violation No. 1 of the NOV and the related CO (Exh. J-l). 2/ By the terms of the consent decree OSMRE agreed to modify the corrective action required for abatement of violation No. 1 to state in part:

> TB, Inc. shall submit to ODOM an application for topsoil substitutes and supplements pursuant to Oklahoma regulation 8l6.22(e). TB, Inc. shall consult with OSM before submitting this plan. This plan shall specify methods of removing topsoil material and substitute topsoil materials and replacing the top- soil material and the substitute topsoil materials. This plan shall also specify the time periods in which each step of the plan will be completed.

(Attachment A to Consent Decree). The consent decree also provided that TBI was to submit the required plan in 60 days and allowed an additional 30 days for TBI to obtain approval of the plan from ODOM.

Under cover letter dated August l7, l984, TBI submitted to ODOM docu- ments which it believed constituted a topsoil substitute plan (Exh. R-9). However, ODOM did not find the plan to be satisfactory. On September l3, l984, Mark Welch, an engineering technician for TBI; Lyle Shingleton, a registered soil agronomist retained by TBI; Kathleen Johnson, agronomist employed by ODOM; Kent Brakken, a certified soil scientist and reclamation specialist employed by OSMRE; and Steve Culvert, an OSMRE inspector, met at

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1/ A separate CO was issued for the second violation. See Turner Brothers, Inc. v. OSMRE, 92 IBLA 320 (l986).

2/ On Aug. 7, l984, an amended consent decision was issued clarifying that the consent decree and decision applied to only violation No. l of NOV No. 84-3-38-3 (Exh. J-2).

the Heavener minesite to examine the site and discuss the deficiencies in the plan and the contents of a satisfactory plan (Tr. 64).

On October 22, l984, 90 days after Judge Miller's consent decision, Inspector Petitto observed the Heavener Mine from the air (Tr. 20). On November l5, l984, he discussed the minesite with OSMRE personnel in the Muskogee, Oklahoma, Field Office and with representatives of TBI (Tr. 2l- 22). The same day, upon ascertaining that a topsoil plan had not been approved as required by the consent decree and that no extension of time
had been granted, Petitto issued CO No. 84-3-259-l3 for failure to abate violation No. l of NOV No. 84-3-38-3 under the terms of the consent decree (Tr. 23). TBI filed an application for expedited review with the Office of Hearings and Appeals on December l7, l984. This application was denied by order issued by Judge Miller on January l5, l985, and the parties were informed that a hearing on the merits of the CO would be set at a later date. The hearing was held on September l9 and 20, l985, and this appeal
is taken from Judge Miller's decision issued following that hearing.

On appeal TBI identifies and argues five issues:

> 1. The decision of the Administrative Law Judge upholding CO 84-3-259-l3 should be reversed due to the fact that the Office of Surface Mining had no jurisdiction to write the CO which is the subject of this appeal.
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> 2. The Administrative Law Judge committed error in upholding CO 84-3-259-l3 due to the fact that the mine site in question, Heavener 3l0l, is an interim permit mine site and not subject to the permanent rules and regulations as allegedly violated in the above mentioned NOV and CO.
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> 3. CO 84-3-259-l3 should be vacated due to the fact that OSM had no jurisdiction to issue NOV 84-3-38-3 (l of 2) under the doctrine of state primacy.
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> 4. CO 84-3-259-l3 should be vacated due to the fact that the Administrative Law Judge committed error in deciding that TBI had waived its jurisdictional arguments to the underlying NOV and CO when it entered into the consent decree.
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> 5. The Administrative Law Judge committed error in upholding CO 84-3-259-l3 due to the fact that OSM did not establish that TBI failed to use good faith in pursuing approval of a topsoil substitute plan.

(Appellant's Brief at 4, 5-6, 10, 15, and 22). The Office of the Solicitor has responded on behalf of OSMRE. For the most part, the arguments on appeal made by both parties were also presented to Judge Miller in their posthearing briefs, and in some instances portions of the earlier briefs appear in the briefs filed with this Board. We shall address each of the issues raised by TBI, but turn to its third and first arguments before considering its more significant second argument.

TBI's third argument is that OSMRE lacked jurisdiction to issue NOV No. 84-3-38-3. This argument is based on a further assertion that a portion of 30 CFR 843.l2(a)(2) governing issuance of NOV's is invalid (Appellant's Brief at ll-l2). Under the regulatory provision, when OSMRE conducts an inspection in a "primacy" state and finds a violation, it must notify the state enforcement authority of its findings. If the state does not take "appropriate action" within l0 days, OSMRE may, following rein- spection of the minesite, issue an NOV. TBI claims that this portion of the regulations is invalid because the district court in Clinchfield Coal Co. v. Hodel, 640 F. Supp. 334 (W.D. Va. l985), found the provision to exceed OSMRE's statutory authority (Appellant's Brief at ll-l2). OSMRE argues that the company's understanding of the decision is incorrect and that, by an order issued in response to a motion for reconsideration, the court limited the scope of its ruling to the granting of temporary relief (Appellee's Brief at 7-8).

[1] While we recognize that the issues of "primacy" and "appropriate action" can involve important and sometimes complex considerations (see, e.g., Peabody Coal Co. v. OSMRE, 95 IBLA 204 (l987); Turner Brothers, Inc. v. OSMRE, 92 IBLA 320 (l986)), in this case we need spend little time on the matter. The district court decision on which TBI bases its argument was appealed to the Fourth Circuit Court of Appeals and was reversed on the basis of the court's prior decisions in Commonwealth of Virginia v. Watt, 74l F.2d 37 (4th Cir. l984), and Tug Valley Recovery Center v. Watt, 703 F.2d 796 (4th Cir. l983), which held that courts in the Fourth Circuit lack jurisdiction to determine the validity of regulations promulgated under the Surface Mining Control and Reclamation Act of l977 (SMCRA). Clinchfield Coal Co. v. DOI, 802 F.2d l02 (4th Cir. l986). The decisions are based upon the provision of SMCRA that "[a]ny action by the Secretary promulgating national rules or regulations * * * shall be subject to judicial review in the United States District Court for the District of Columbia Circuit." 43 U.S.C. | 1276(a)(1) (1982). Although TBI frames its argument as to NOV No. 84-3-38-3 in terms of OSMRE's jurisdiction, it is clearly based on a claim that a portion of 30 CFR 843.l2(a)(l) is invalid. Accordingly, we need not consider it. See OSMRE V. Calvert & Marsh Coal Co., 95 IBLA l82, l90-9l (l987).

Appellant also claims, in its first argument on appeal, that OSMRE lacked jurisdiction to issue CO No. 84-3-259-l3. TBI bases its argument on an assertion that when OSMRE took over enforcement of the Oklahoma sur- face mining regulatory program by notice published in the Federal Register April l2, l984 (49 FR l4674), it failed to comply with the requirement of the Administrative Procedure Act (APA) that a substantive rule be published "not less than 30 days before its effective date" unless one of the except- ions provided by 5 U.S.C. | 553(d) (l982) applies (Appellant's Brief at 4-5). OSMRE's published notice stated that its action was effective April 30, l984. The consequence of the asserted violation, TBI further claims, is that the "rule" taking over the Oklahoma program was void and OSMRE lacked authority to enforce the Oklahoma surface mining regulatory program (Appellant's Brief at 5).

[2] Judge Miller rejected TBI's argument based on four previous cases in which the same argument had been raised and rejected. The Judge was correct. Each of the prior decisions cited by him was appealed to this Board, and in each we have specifically affirmed the point. 3/ Our rejection of TBI's argument has been based on the decision of the court in Oklahoma v. Hodel, Civ. No. 84-l202-A (W.D. Okla. Dec. 3, l985), that the
administrative procedures established by SMCRA, specifically 30 U.S.C. | 1271(b) (l982), override those established by the APA and, therefore,
no violation of 5 U.S.C. | 553(d) (l982) occurred when OSMRE did not pro-
vide notice 30 days prior to taking over the Oklahoma program. See Turner Brothers, Inc. v. OSMRE, 92 IBLA 38l, 387-88 (l986). Accordingly, we affirm Judge Miller's decision on this point.

Appellant's second argument on appeal is that the permit for its Heavener 3l01 mine issued September l6, l98l, is an interim permit and
the mine was not subject to the Oklahoma permanent program regulations allegedly violated. In his decision, Judge Miller did not discuss the nature of TBI's permit, finding instead that the consent decree signed
by the parties established OPRPR 8l6.22(e) as the applicable standard and that, consequently, TBI could not argue that some other standard applied (Decision at 7). In its appeal TBI renews its assertion that the company holds an interim permit. It does so based on the history of the Oklahoma permanent regulatory program reflected in documents the company has supplied as exhibits to its statement of reasons. In response OSMRE argues that TBI's permit is a permanent program permit because effective January l9, l98l, the Secretary of the Interior conditionally approved Oklahoma's permanent program regulations and the condition was removed July 20, l98l (OSMRE Reply Brief at 5-7). OSMRE also argues that by signing the consent decree TBI conceded the validity of the violation, agreed to comply with the requirements of OPRPR 8l6.22(e), and is bound by that agreement. OSMRE additionally argues that principles of res judicata and collateral estoppel preclude TBI from attacking the applicability of the regulation (OSMRE Reply Brief at 2-4). In turn, TBI argues that under the provisions of the consent decree the company did not admit the validity of the NOV and can challenge it, that the doctrine of collateral estoppel does not apply to consent judgments, and that issues as to subject matter jurisdiction are never waived and can be raised at any time (TBI Reply Brief at 2-3, TBI Second Reply Brief at l-3).

The documents provided by TBI on appeal show that by petition filed November 2l, l980, the Oklahoma Mining and Reclamation Association, TBI,

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3/ See Turner Brothers, Inc. v. OSMRE, l00 IBLA 365 (l987); Turner Brothers, Inc. v. OSMRE, 99 IBLA 349 (l987); Turner Brothers, Inc. v.
OSMRE, 93 IBLA l94 (l986), appeal dismissed, Civ. No. 86-C-852-C (N.D. Okla. Mar. l2, l987); Turner Brothers, Inc. v. OSMRE, 92 IBLA 38l (l986), appeal filed, Civ. No. 86-C-74lB (N.D. Okla. Aug. l3, l986).

and other coal mine operators brought suit in the District Court of Oklahoma County requesting an injunction to prevent the State of Oklahoma and ODOM from enforcing Oklahoma's permanent program regulations (Exh. A). The petition noted that under SMCRA the state was required to obtain approval of a permanent regulatory program conforming to standards set by Federal statutes and regulations or the Secretary would take over enforcement in Oklahoma, imposing a Federal program (Exh. A at l3). The petition also noted that the court in Virginia Surface Mining & Reclamation Association v. Andrus, 483 F. Supp. 425 (W.D. Va. l980), had held portions of SMCRA to be unconstitutional, with review pending in the Supreme Court (449 U.S. 8l7 (l980)), 4/ and that the Federal regulations to which the Oklahoma permanent regulations were to conform were in litigation in other Federal courts (Exh. A at 5-6). The plaintiffs argued that unless the court granted the injunc- tion, so that 30 U.S.C. | 1253(d) (l982) would preclude the Department from imposing a Federal program, the state would be required to submit a perma- nent regulatory program and the companies would be required to expend funds to comply with the standards set by unlawful Federal statutes and regula- tions (Exh. A at 6-7).

On December 3, l980, the court issued a temporary restraining order prohibiting the defendants from submitting a permanent regulatory program to the Secretary and from implementing and enforcing regulations other than the interim regulations (Exh. B). Following a hearing, the court issued a permanent injunction (Exh. C), but upon further hearing held January 9, l98l, the court vacated the permanent injunction and issued a temporary injunction prohibiting defendants from enforcing the permanent

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4/ Because the permanent program regulations were not in effect, the district court, and consequently the Supreme Court, did not review their validity. 483 F. Supp. at 429. The district court held the steep slope provisions of 30 U.S.C. | l265(d) and (e) unconstitutional under the Tenth Amendment based upon the analysis of the provision presented in National League of Cities v. Usery, 426 U.S. 833 (l976). 483 F. Supp. at 43l-35. It further found 30 U.S.C. || l265(d) and (e), l272, and SMCRA's provisions requiring restoration of steep slopes to original contours to constitute unconstitutional takings under the Fifth Amendment following Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (l922). 483 F. Supp. at 436-42. Based on procedural due process concerns, the court also enjoined the issuance of cessation orders without a prior hearing and the application of 30 U.S.C. | l268 (l982) requiring prepayment of civil penalties when no provision is made for obtaining temporary relief. 483 F. Supp. at 442-48. The Supreme Court reversed the district court on each of these points. Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264 (l98l); see also Hodel v. Indiana, 452 U.S. 3l4 (l98l). The Supreme Court sub- sequently overruled National League of Cities v. Usery in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (l985).

program regulations which, in the meantime, had been submitted to the Department (Exh. D). While this order was in effect, on February l2, l98l, the Oklahoma House of Representatives adopted a resolution disapproving of the permanent program regulations promulgated by the ODOM (Exh. E). Stating that "[t]he effect of the legislative disapproval of the permanent rules and regulations is to render the same of no force or effect and void," ODOM and the other defendants moved the Oklahoma court to dissolve the temporary injunction (Exh. F). This motion was granted on July 20, l98l (Exh. G).

While the history of the Oklahoma litigation is relevant, TBI's argument that its Heavener 3l0l permit is an interim permit is based on the resolution of the Oklahoma House of Representatives. An Oklahoma statute provides: "By the adoption of a resolution, either house of the Legislature may disapprove any rule * * * and the adopting agency shall not have authority to repromulgate such rule, except during the first sixty (60) days of a subsequent legislative session." Okla. Stat. tit. 75, | 308 (l987). In effect, TBI argues that when its permit was issued on September l6, l98l, it must have been issued under interim program regula- tions because the action of the Oklahoma House of Representatives precluded the Oklahoma permanent regulatory program from taking effect and under the Oklahoma statute new permanent program regulations could not be established until the next legislative session in l982.

In its brief OSMRE does not discuss either the Oklahoma resolution or the statute relied on by TBI. Instead, it relies on its published approval of the Oklahoma permanent program regulations at 46 FR 4902 (Jan. l9, l98l). This approval notice stated that due to the temporary injunction the interim program regulations would remain in effect, but that if the injunc- tion terminated within a year, the conditionally approved program would take immediate effect. Id. at 49l0. OSMRE argues that upon dissolution of the temporary injunction on July 20, l98l, the permanent program was implemented in Oklahoma prior to the issuance of TBI's permit (Appellee's Brief at 5).

While the parties clearly disagree about the effective date of the Oklahoma permanent program regulations, neither offers any reason why the date advocated by the other is incorrect. The reason may be that because the status of the Oklahoma program was left unresolved in l98l, there is simply no proper legal basis on which the matter may now be set- tled. It appears that, as recognized by the defendants in the Oklahoma litigation, the action of the Oklahoma House of Representatives left ODOM without authority under Oklahoma law to enforce its permanent program regu- lations. On the other hand, OSMRE has consistently treated the regulations as having been approved. Subsequent to the dissolution of the temporary injunction, OSMRE's Director determined that he had "reason to believe that Oklahoma may no longer be able to implement its permanent program due to the State Legislature's recision of Oklahoma's surface mining regulations." 46 FR 49846, 49847 (Oct. 8, l98l). He notified the State of his determin- ation, and the State requested an informal conference as provided for by 30 CFR 733.l2(c). Id. Following the conference, ODOM submitted a set of emergency regulations to OSMRE, and on January 22, l982, submitted "a proposed amendment to its permanent regulatory program" consisting of "a set of rules intended to replace those rules rescinded by the Oklahoma Legislature." 47 FR l4l52 (Apr. 2, l982). In reviewing the "proposed amendment" OSMRE followed the provisions at 30 CFR 732.l7(h) regarding

amendments to approved permanent regulation programs and the requirements of 30 CFR 733.l2 pertaining to permanent programs. Similarly, in taking over enforcement of the Oklahoma program in l984, OSMRE reviewed Oklahoma's program on the basis that: "All permits issued after July 20, l98l, are considered permanent program permits." 49 FR l4674, l4676 (Apr. l2, l984).

[3] We need resolve the peculiar status of the Oklahoma permanent pro- gram regulations only if the matter will have some bearing on the outcome of this appeal. OSMRE argues that it cannot because TBI is "collaterally estopped from arguing that the standards of OPRPR 8l6.22(e) are not appli- cable" due to the consent decree (Appellee's Brief at 6). Judge Miller and OSMRE were clearly correct that by signing the consent decree TBI agreed to be bound by OPRPR 8l6.22(e) (Decision at 7, Tr. l30-3l). In particular, TBI agreed to submit and obtain approval of a topsoil substitute plan com- plying with the regulation. The company is now bound to the agreement as a matter of contract if for no other reason. See United States v. ITT Con- tinental Baking Co., 420 U.S. 223, 235-38, 247 (l975); Village of Kaktovik v. Watt, 689 F.2d 222, 230 (D.C. Cir. l982). In other words, whatever the nature of its permit, the parties agreed upon OPRPR 8l6.22(e) as the stand- ard under which abatement would be undertaken. TBI, however, has never denied this (See TBI Posthearing Brief at 6, TBI Second Reply Brief at l-2, Appellant's Brief at 2, l6). Rather, TBI contends that the citation of OPRPR 8l6.2l and 8l6.22(a)-(c) in NOV No. 84-3-38-3 issued February 2, l984, and in CO No. 84-3-38-3 issued November l5, l984, was legally erroneous and that the consequence of the error is that the CO should be vacated (see TBI Posthearing Brief at 5, TBI Second Reply Brief at 2).

Considering initially the NOV, we find that OSMRE correctly argues that the effect of the consent decree is to bar TBI from challenging the NOV's validity, although we reach this conclusion on a different basis than the one advanced by OSMRE. As judicial doctrines, res judicata and collateral estoppel have clear rules governing their application. See 46 Am. Jur. 2d Judgments || 394-397 (1969). As legal terms, however, they also can have broader meanings when the concepts they represent are applied in circumstances other than judicial proceedings. Strictly speaking, res judicata (also called "estoppel by judgment") concerns claim preclusion:

A party may not raise an issue relevant or related to a claim ruled upon in a prior judgment between the parties because the claim has been "merged" into the judgment and, in effect, no longer exists. Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc., 575 F.2d 530, 535 (5th Cir. l978); 50 C.J.S. Judgments | 593 (l947); 46 Am. Jur. 2d Judgments || 383, 397, 404 (l969). Collateral estoppel (sometimes also discussed as res judicata and also referred to as "estoppel by verdict") is a matter of issue preclusion: A party may not raise an issue actually litigated and settled by the judg- ment in a prior proceeding between the same parties. Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc., supra at 535-36; 50 C.J.S. Judgments | 593 (l947); 46 Am. Jur. 2d Judgments || 397, 415 (l969).

[4] Because both res judicata and collateral estoppel require a judgment based on the merits, neither doctrine, in the form they have been developed and applied by the courts, is directly applicable to a decision
of an agency which, as in the present case, was not based upon a hearing or other adjudication of factual and legal issues. See Delamater v. Schweiker, 72l F.2d 50, 53-54 (2d Cir. l983); 50 C.J.S. Judgments || 6l4, 626, 696 (l947); 46 Am. Jur. 2d Judgments || 439, 477 (l969). There is no question, however, that the general principle of res judicata may apply to adminis- trative proceedings. "When an administrative agency is acting in a judi- cial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (l966); see Restatement Second of Judgments | 83 (l982); 4 Davis, Administrative Law Treatise | 2l:2 (2d ed. l983); 4 Stein, Mitchell & Mezines, Administrative Law | 40.01 (1987).

The Department has long recognized the need to apply the principle of res judicata so that decisions by its administrative officials are not per- petually subject to reexamination. Rancho San Rafael de la Zanja, 4 L.D. 482, 483 (l886). The administrative counterpart of the principle of res judicata--the doctrine of administrative finality--precludes reconsideration of a decision of an agency official when a party, or his predecessor-in- interest, had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed. P&K Coal Co. v. OSMRE, 98 IBLA 26, 32 (l987); John W. Roth, 8 IBLA 39 (l972); Duncan Miller, l IBLA l74 (l970). The rule is not absolute, because deci- sions by administrative officials, as well as those of this Board, are made exercising authority delegated by the Secretary of the Interior. The Sec- retary, and those exercising his authority, may review a matter previously decided and correct or reverse an erroneous decision. See Gabbs Explora- tion Co. v. Udall, 3l5 F.2d 37, 40 (D.C. Cir. l963); 50 C.J.S. Judgments | 606 (l947). Reexamination of a decision which has become final is available only upon a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent an injustice. P&K Coal Co. v. OSMRE, supra at 32; Village of South Naknek, 85 IBLA 74 (l985); Ida Mae Rose, 73 IBLA 97 (l983); Lillian Barlow, 58 IBLA 385 (l98l); Western Slope Gas Co. (On Reconsideration), 43 IBLA 259, 263 (l979), and cases cited therein.

[5] In the present case TBI filed an application for review of the
NOV and would have received a hearing addressing all factual and legal issues the company wished to raise. In reaching the agreement with OSMRE embodied in the consent decree, TBI agreed to withdraw its application for review. By his consent decision Judge Miller dismissed TBI's application for review of the NOV. No appeal from the dismissal was taken, nor was
any issue raised as to the resulting modification of the NOV. See 30 U.S.C. | l275(a) (l982); 43 CFR 4.ll6l. Judge Miller's decision is entitled to repose. P&K Coal Co. v. OSMRE, supra at 32. The consequence of the with- drawal and dismissal of the application for review of the NOV was that no application for review was pending before the Office of Hearings and Appeals. There was no longer a basis on which TBI could raise issues as

to the specifications of the NOV, absent a showing of compelling equitable or legal reasons why the consent decision should be set aside. TBI made no such showing to the Judge and has presented none to this Board. Accord- ingly, we conclude that TBI may not raise an issue as to the propriety of citing Oklahoma permanent program regulations in the NOV.

While we find that the Judge's consent decision of July 24, l984, as amended August 7, l984, is final, we do not either adopt the argument of OSMRE as to the collateral estoppel effect of consent decrees or reject the argument of TBI. Both parties argue the issue based on decisions cited in Annotation, "Modern Views of State Courts As to Whether Consent Judgment is Entitled to Res Judicata or Collateral Estoppel Effect," 9l A.L.R. 3d ll70 (l979). The cases are not in agreement. It is also not immediately appar- ent that consent decisions issued in administrative enforcement proceedings should be regarded as equivalent to consent judgments issued by courts in civil proceedings. Additionally, in the present case neither the consent decree signed by the parties nor the consent decision issued by the Judge specifies any resolution of factual or legal issues on which we might base a finding that either party is precluded from raising a specific issue of fact or law. See Southern Pacific Communications Co. v. American Telephone & Telegraph Co., 740 F.2d l0ll, l02l (D.C. Cir. l984). Our conclusion in the present case is much simpler: TBI may not challenge the contents of the NOV because the company withdrew its application for review, and OPRPR 8l6.22(e) applies because the parties had agreed to its application.

[6] We turn next to the citation of the Oklahoma regulations in CO No. 84-3-259-l3. The CO was issued after the consent decree and was the subject of the hearing which is before us on review. TBI is not foreclosed from raising the issue of the status of its permit and the propriety of cit-ing the Oklahoma permanent program regulations in the CO. However, we need not decide upon the nature of TBI's permit in order to reach a resolution of the issue. A review of the relevant law reveals that, even if the citation of Oklahoma's permanent program regulations was in error, TBI could suffer no adverse consequence.

SMCRA requires that NOV's and CO's "set forth with reasonable speci- ficity the nature of a violation and the remedial action required, the period of time established for abatement, and a reasonable description of the portion of the surface coal mining and reclamation operation to which the notice or order applies." 30 U.S.C. | l27l(a)(5) (l982). After review-ing a series of cases concerning the propriety of regulatory citations in NOV's, 5/ the Interior Board of Surface Mining and Reclamation Appeals concluded:

> The basic purposes of an NOV are to inform the recipient of the nature and extent of circumstances at a surface coal

5/ Renfro Construction Co., 2 IBSMA 372, 87 I.D. 584 (l980); Hardly Able Coal Co., 2 IBSMA 332, 87 I.D. 557 (l980); Grafton Coal Co., 2 IBSMA 3l6, 87 I.D. 52l (l980); Island Creek Coal Co., 2 IBSMA l25, 87 I.D. 304 (l980); Old Ben Coal Co., 2 IBSMA 38, 87 I.D. ll9 (l980).

> mining and reclamation operation found to be in violation of
> OSM's regulatory standards, and to require certain action to eliminate those circumstances. The first purpose is served when the terms of the notice are sufficiently particular to guide the review process, at least to the extent of informing the recipient sufficiently to facilitate (l) a reasoned determination whether the allegation should be contested and, if so, (2) preparation for such action. When a course of abatement action is prescribed in terms clearly related to an alleged violation, the second purpose is served. The greater OSM's precision in its composition of an NOV, the more likely it is that these criteria will be met; how- ever, arguable ambiguities in the contents of an otherwise proper NOV do not invalidate OSM's enforcement action in the absence of a showing of actual prejudice to the recipient as a result of such ambiguities. [Footnotes omitted.]

Renfro Construction Co., 2 IBSMA 372, 377-78, 87 I.D. 584, 587 (l980). Thus, an NOV must inform a party of the specific nature of the legal standard for which he is being cited, the specific condition at the mine-site which has been found to constitute a violation, and the specific manner by which the condition may be abated. Similarly, a CO must inform a party of the particular legal standard at issue and the condition at the minesite which violates the standard. As reflected in the language of Renfro, the ultimate concerns underlying the statutory standard, and accordingly its application by this Board, are those basic standards of fundamental fair- ness and procedural due process common to all enforcement proceedings.

Like the NOV, the CO stated that TBI had "failed to remove and salvage all topsoil in a separate area from areas to be disturbed by mining opera- tions." While arguably not sufficiently specific by itself, this statement must be read in light of the regulations cited in order to determine its sufficiency. The relevant provisions of the Oklahoma regulations provide:

> | 8l6.2l Topsoil: General Requirements.
>
> (a) Before disturbance of an area, topsoil and subsoils to be saved under Section 8l6.22 shall be separately removed and segregated from other material.
>
> * * * * * * *
>
> | 8l6.22 Topsoil: Removal.
>
> (a) Timing. Topsoil shall be removed after vegetative cover that would interfere with the use of the topsoil is cleared from the areas to be disturbed, but before any drilling, blasting, mining, or other surface disturbance.
>
> (b) Materials to be removed. All topsoil shall be removed in a separate layer from the areas to be disturbed, unless use of substitute or supplemental materials is approved by the Department in accordance with paragraph (e) of this Section. * * *

> (c) Material to be removed in thi[n] topsoil situations. If the topsoil is less than 6 inches, a 6-inch layer that includes the A horizon and the unconsolidated materials immediately below the A horizon or the A horizon and all unconsolidated material if the total available is less than 6 inches, shall be removed and the mixture segregated and redistributed as the surface soil layer, unless topsoil substitutes are approved by the Department pursuant to paragraph (e) of this Section.

TBI argues that citation of these provisions was improper because its permit was an interim program permit. However, we fail to find any sub- stantive difference between the provisions quoted above and those of the Oklahoma interim program regulations. By executive order, then Governor David L. Boren adopted the Federal interim permit regulations published at 42 FR 62675-7l3 (Dec. l3, l977), as the Oklahoma interim program regulations. Exec. Order No. 78-24 (July ll, l978). The topsoil handling portion of those regulations provided:

> (a) Topsoil removal. All topsoil to be salvaged shall be removed before any drilling for blasting, mining, or other surface disturbance.
>
> (l) All topsoil shall be removed unless use of alternative materials is approved by the regulatory authority in accordance with subparagraph (4). * * *
>
> (2) All of the A horizon of the topsoil as identified by soil surveys shall be removed according to paragraph (a) and then replaced on disturbed areas as the surface soil layers. Where the A horizon is less than 6 inches, a 6-inch layer that includes the A horizon and the unconsolidated material immediately below the A horizon (or all unconsolidated material if the total available is less than 6 inches) shall be removed and the mixture segregated and replaced as the surface soil layer.

42 FR 62684 (Dec. 13, 1977).

As can be seen, the requirements of the Oklahoma permanent program regulations and those of the Federal interim program regulations adopted by Oklahoma vary only in their incidental wording and not as to substantive requirements. In either case, TBI would have been sufficiently informed that the deficiency found by the inspector was the company's failure to remove and segregate the top 6 inches of either topsoil or topsoil and subsoil. Thus, TBI's complaint as to the propriety of the citation of the permanent program regulations cannot be based on the NOV's failure to spe-cify the nature of the alleged violation and the conditions at the mine-site considered to be in violation. Rather, TBI's allegation appears to be simply an attempt to convert the unresolved status of the Oklahoma program in l98l into a technical violation, as though the company were being held to a legal standard which was not applicable. As shown by the regulations quoted, for the violation for which TBI was cited, there was no substantive

difference between the interim and permanent program standards. Accord- ingly, we cannot say that error in citing the permanent program regula- tions, if any, resulted in failure to give proper notice to TBI or affected any rights of the company. Renfro Construction Co., supra; cf. OSMRE v. Ewell L. Spradlin Coal Co., 93 IBLA 386 (l986) (error prejudicial).

The error about which TBI complains is also technical in another sense. By reason of the consent decree, the issue at the hearing was not whether TBI had violated the Oklahoma regulations cited in the NOV or the CO, but whether TBI had developed a plan for abating the condition under OPRPR 8l6.22(e) as it had agreed to do in the consent decree. This was in accord with the language of the CO which stated that it was issued because:

> The permittee or operator has failed to abate Violation No. l of 2 included in Notice of Violation No. 84-3-38-3 within the time for abatement originally fixed or subsequently extended pursuant to Section 52l(a)(3) of the Act, and as per consent decree dated July l7, l984 and attachment "A" provisions of that decree resul- tant of USDOI-OHA docket #TU-4-5-R, TU-4-9-R, and TU-4-24-R.

Thus, even if we were to agree with TBI that its Heavener 3l0l permit is an interim permit and that the citation of Oklahoma permanent program regu- lations was improper, our conclusion would have no consequence as to the issues raised at the hearing regarding TBI's compliance with the consent decree or our review of the Judge's findings, and therefore would provide no basis for vacating the CO as requested by TBI.

Although we have considered and ruled upon each of TBI's first three arguments on appeal, we will also briefly address its fourth argument that Judge Miller erred in not ruling on each of the three. As previously stated, Judge Miller ruled on TBI's argument as to OSMRE's jurisdiction to issue the CO, but did not address the other two issues because he believed them barred by the consent decision. TBI argues this was error because of the well-established rule that issues as to subject matter jurisdiction can be raised any time.

[7] We do not disagree with the rule or that it is a rule. TBI errs, however, in equating OSMRE's administrative authority with the jurisdiction of a court. "Jurisdiction" is not univocal. It is not uncommon to refer to the authority of a Federal agency to promulgate and enforce regulatory standards concerning an activity as the agency's "jurisdiction." However, the usage does not mean that the law pertaining to jurisdiction in judicial proceedings applies to regulatory actions by administrative agencies. A party in a judicial proceeding cannot waive objections to the court's sub- ject matter jurisdiction because parties cannot confer such jurisdiction on a court by consent; rather, a court's jurisdiction is set by the sover- eign authority which establishes the court. 2l C.J.S. Courts || l5(a), 28, 85(a) (l940); 20 Am. Jur. 2d Courts || 9l, l39 (l965). As an administrative agency, OSMRE's authority also comes from a sovereign authority, and the agency is limited by the authority delegated to it. The statute authorizing OSMRE to inspect minesites provides:

> The Secretary shall cause to be made such inspections of any surface coal mining and reclamation operations as are necessary to evaluate the administration of approved State programs, or to develop or enforce any Federal program, and for such purposes authorized representatives of the Secretary shall have a right of entry to, upon, or through any surface coal mining and reclamation operations.

30 U.S.C. | l267(a) (l982). Thus, OSMRE has "jurisdiction" over all surface coal mining and reclamation operations when inspecting for the purposes stated in the statute. See also id. || l252(e), l27l(a). The only issue as to "subject matter jurisdiction" for inspections which might be analogous and could be raised is that the site inspected is outside the scope of SMCRA because it is not a surface coal mining or reclamation operation, is not engaged in any activity connected with a surface coal mine, or does not otherwise come under the provisions of SMCRA. See 30 U.S.C. | l29l(28) (l982); cf. Race Fork Coal Corp. v. OSMRE, 84 IBLA 383, 92 I.D. 68 (l985). In contrast, TBI's arguments concern whether a provision of the regulations is valid, whether OSMRE complied with the APA, and whether the NOV and CO issued by OSMRE contained errors as to the regulations cited. If these arguments were correct, they would establish that OSMRE erred in the manner in which it exercised its authority, but would not establish that it exceeded its "subject matter jurisdiction." Accordingly, Judge Miller did not err when he did not address these TBI arguments.

Finally, we turn to appellant's fifth argument that Judge Miller erred in concluding that CO No. 84-3-259-l3 was validly issued. TBI frames the issue as one concerning its good faith in pursuing approval of a topsoil substitute plan and contends that TBI "was not acting in bad faith but was making diligent attempts to comply with the requirements of ODOM for a top- soil substitute plan" (Appellant's Brief at 23). We do not agree.

As quoted above in addressing TBI's second argument, CO No. 84-3-259-13 was issued to TBI after a finding by Inspector Petitto that TBI had failed to abate as required by the NOV. At the time the CO was issued, the abatement called for was the modified abatement provision set forth in the attachment to the consent decree and quoted at the outset of this opinion. By the consent decree, TBI agreed to submit a topsoil substitute plan pursuant to OPRPR 8l6.22(e) within 60 days and obtain approval within 90 days. Thus, the issue before us is whether Judge Miller correctly found that the CO was properly issued because TBI had failed to submit a topsoil substitute plan conforming to the regulation. The language as to diligence and good faith emphasized by TBI comes from the por- tion of the consent decree stating: "[T]he parties understand that it is the obligation of TB, Inc. to pursue approval of this plan diligently and in good faith and to abate the NOV within the mandated 90 days" (Exh. J-l). While TBI's good faith may ultimately have some relevance, the initial issue is the propriety of the issuance of the CO.

TBI and OSMRE agreed upon a course of action to be taken. This course of action was stated in the consent decree by reference to a regulation providing:

(l) Selected overburden materials may be substituted for or used as a supplement to, topsoil, if the Department determines that the resulting soil medium is equal to or more suitable for sustaining revegetation than is the available topsoil and the substitute material is the best available to support revegeta- tion. This determination shall be based on:

(i) The results of chemical and physical analyses of overburden and topsoil. These analyses shall include deter- minations of pH, net acidity or alkalinity, phosphorous, potassium, texture class, and other analyses as required by the Department of Mines. The Department may also require that results of field-site trials or greenhouse tests be used to demonstrate the feasibility of using these overburden materials.

(ii) Results of analyses, trials, and tests shall be sub- mitted to the Department of Mines. Certification of trials and tests shall be made by a laboratory approved by the Department stating that:

(A) The proposed substitute material is equal to or more suitable for sustaining the vegetation than is the available topsoil.

(B) The substitute material is the best available material to support the vegetation; and

(C) The trials and tests were conducted using standard test- ing procedures.

(2) Substituted or supplemental material shall be removed, segregated, and replaced in compliance with the requirements for topsoil under this Section.

OPRPR 8l6.22(e) (Exh. R-l0). TBI made two submissions of documents to ODOM. The first (Exh. R-9) consisted of a cover letter dated August l7, l984, copies of the consent decree and decision, a letter dated March 29, l984, from TBI to Inspector Petitto providing information as to topsoil stockpiles, a letter dated April 26, l984, from TBI to Michael Lett of OSMRE addressing TBI's compliance with abatement step number two in the original NOV, copies of nine soil test reports dated April l2, l984, from the Soil and Water Service Laboratory, Agronomy Department, Oklahoma State University Cooperative Extension Service, and a letter dated June l8, l984, from TBI to Lett concerning topsoil amounts with an accompanying report from Lyle Shingleton. TBI's second submission (Exh. R-ll) consisted of a report from Shingleton concerning soils and plants at the minesite and a cover letter from TBI to Kathleen Johnson of ODOM dated October l2, l984. Some of the letters and reports refer to maps and one or more maps not now in the record accompanied the materials when submitted (Tr. 54-55, 75-76).

A simple review of TBI's submissions shows that they are inadequate to meet the requirements set out in OPRPR 8l6.22(e). The regulation allows substitute overburden materials if ODOM approves such action after making the determinations described in the regulation based on a review of infor- mation submitted by the operator for that purpose. TBI's submissions con- tained no analyses of pH, net acidity or alkalinity, phosphorous, potassium, texture class, or other analyses, and thus fail to comply with OPRPR 8l6.22(e)(l)(i). The soil tests reports refer to some of these items but only to the extent of stating the amount of supplemental material required to support particular types of vegetation. Nor do TBI's submissions con- tain any results of analyses, trials, and tests performed by an approved laboratory addressing the list stated in OPRPR 8l6.22(e)(ii)(A)-(C). See 30 CFR 8l6.200. Furthermore, the modified abatement provision stated that TBI's topsoil substitute plan was to specify methods for removing and replacing topsoil and substituted material and a timetable for undertaking the actions. Neither submission addresses these matters. The deficiencies in the submissions were addressed in the testimony given at the hearing (Tr. 56-6l, 77-82, l2l-27) and addressed by Judge Miller in his decision. We affirm his determinations.

TBI's argument that it was diligent is based on the fact that its top- soil substitute plan was the first received by ODOM and that, as a result, ODOM lacked criteria for reviewing and approving a plan (Tr. 6l-62). Wit- ness Johnson testified that after she had consulted others, including Kent Brakken of OSMRE, and researched the matter, she developed a list of stand- ards (Tr. 62, l0l-02). This led to the meeting at the minesite to address the deficiencies in TBI's topsoil substitute plan (Tr. 64-68, 79, l09-l0, ll6-l7), a number of telephone calls (Tr. 73-74, 83), and a letter dated November l5, l984, listing items to be included in a topsoil substitute plan. In its brief, TBI emphasizes, as it did at the hearing, that stand- ards were in the process of being developed, that the company did not receive a written response to its first submission, and that the company
did not receive a list of requirements until the November l5 letter.

It is a matter of record that ODOM worked to develop standards for topsoil substitute plans in response to TBI's initial submission, and we
do not doubt that the company may have had some legitimate uncertainty
about the full scope and nature of materials it would be required to sub-
mit in order to satisfy ODOM. However, it does not follow that TBI had no guidelines to follow in preparing to submit a topsoil substitute plan to ODOM or that TBI acted diligently and in good faith when making its sub-
missions to ODOM. As a minimum, the company could have relied upon the matters addressed by OPRPR 8l6.22(e). Instead, TBI's first submission consists entirely of documents which predate the consent decree and which were apparently taken from the company's files in order to make a token attempt to submit a "plan." TBI's second submission, made following the meeting at the minesite, provided some additional information, but was far short of remedying the deficiencies. We would be more sympathetic to TBI's claim of diligence and good faith if the documents it submitted to ODOM bore a reasonable relationship to the information called for in OPRPR 8l6.22(e). Instead, the documents repeat the single idea that in one manner or another

TBI would abate the NOV by moving material from one part of the minesite to another, while failing to provide any of the information which ODOM would have to consider pursuant to OPRPR 8l6.22(e) when determining the feasi- bility of using substitute materials, and the specific information called for in the modified abatement provision.

Neither Judge Miller nor this Board holds TBI responsible for a fail-
ure to meet standards which were unknown to TBI. Nor do either of our decisions uphold the CO because TBI did not obtain approval of a plan
within the 90-day period set by the modified abatement provision. Rather, the Board upholds Judge Miller's determination that the CO was properly issued because TBI had failed to submit a topsoil substitute plan which could be construed as somehow meeting the standards of OPRPR 8l6.22(e). Additionally, we agree with Judge Miller's evaluation of the testimony at the hearing and finding that TBI was not diligent in presenting a meaningful topsoil substitute plan to ODOM.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.l, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

102 IBLA 129

SPECIAL CONCURRENCE BY AJ HARRIS, 102 IBLA 130, MISSING.